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THE AMERICAN TOBACCO COMPANY'S CASE AND THE SHERMAN ACT. — The Circuit Court of Appeals has recently decided that the American Tobacco Company and others of its controlled companies are combinations in restraint of trade under § 1 of the Sherman Act.[1] *United States* v. *American Tobacco Co.*, 40 N. Y. L. J. 69 (Circ. Ct., S. D. N. Y., Nov. 7, 1908).

The Supreme Court of the United States early decided that the Act went beyond what is said to be the common law restraint of trade in the strict sense and included restraint of competition.[2] But in further saying that the Act abolished as a criterion of illegality the old common law distinction between reasonable and unreasonable restraints, it is submitted that the court burned behind it the only bridge to a qualification of the unqualified words of the legislature which had any preëxisting foundation in the law and would yet protect legitimate combination. In the place of this common law test of reasonableness was substituted the test of directness, distinguishing those combinations which directly restrained interstate commerce from those whose restraint was merely indirect.[3] This test of directness has been applied equally as a criterion for two entirely distinct questions — the constitutional question of the power of Congress over a combination, and the question of its illegality under the Act.[4] This test was not voiced by the legislature and is not found in the common law. Nor is it a proper test of the constitutional power of Congress over the prohibited combinations. Congress has

[1] 26 U. S. Stat. at L. 209, which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or in the foreign nations."

[2] U. S. *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290; U. S. *v.* Joint Traffic Ass'n, 171 U. S. 505. *Cf.* 17 HARV. L. REV. 474; 20 *ibid.* 167, 169.

[3] U. S. *v.* Trans-Missouri Freight Ass'n; U. S. *v.* Joint Traffic Ass'n, *supra;* Hopkins *v.* U. S., 171 U. S. 578.

[4] See 17 HARV. L. REV. 533, 535.

no power under the Constitution to regulate matters which only remotely or incidentally affect interstate commerce, since action by it in such matters would not really be a regulation of interstate commerce. But if an act does really affect interstate commerce — whether directly or indirectly — it should be regarded as within the scope of the power of Congress. The constitutional question is not as to the manner in which commerce between the states is affected, but whether it is in reality affected at all.

The defendant tobacco companies relied much on *United States* v. *Knight*[5] as authorizing their actions under the court's present test. There, a combination of sugar refineries was held to be engaged in manufacturing only, not in interstate commerce, and hence not within the Act. However the effect of such a combination of interstate manufacturers is directly to restrain competition in the sale of the product outside the state. Furthermore later decisions of the Supreme Court insist that "the most innocent and constitutionally protected of acts . . . may be made a step in a criminal plot"[6] and that transactions in restraint of interstate commerce must be considered as a whole.[7] Therefore, while Congress has no power to regulate manufacturing,[8] it has power to regulate combinations of manufacturers formed to restrain interstate trade. Indeed, if commercial transactions are to be divided as in the Knight case into their integral parts, "Interstate Commerce" becomes restricted to transportation. But if they are to be considered as a whole, then the present combination, engaged in buying, manufacturing, and selling, seems on any test to be clearly within the Act.[9]

The Circuit Court of Appeals considered the Knight case as overruled. Only a year ago, however, the Supreme Court distinguished it from the case which the circuit court deems to have overruled it.[10] It is submitted that, although there is a clear enough distinction in the degree of directness with which interstate commerce is affected, yet in both these cases there was really a direct effect. Furthermore, in a late case[11] a sale of a transportation line engaged in interstate commerce with an agreement not to compete was held not within the Act, though the restraint operated directly on interstate commerce, and the fact that the restraint was collateral to the main purpose of the contract does not affect the result on interstate commerce. In the Northern Securities case[12] Mr. Justice Brewer returned to the test of reasonableness. The test of directness, in the ordinary sense of the word, unflinchingly applied, is the *reductio ad absurdum* of the Act. In view of its recent decisions the court cannot be so using the word. Is it saving the Act and returning to the test of reasonableness by considering "directly," as it has used the word, synonymous with "reasonably"?[13]

CONSTITUTIONALITY OF A STATUTE COMPELLING THE COLOR LINE IN PRIVATE SCHOOLS. — Mr. Justice Harlan, dissenting with one other justice

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[5] 156 U. S. 1.
[6] Aikens *v.* Mo., 195 U. S. 194, 206.
[7] Swift *v.* U. S., 196 U. S. 375, 396; Loewe *v.* Lawlor, 208 U. S. 274, 298.
[8] Kidd *v.* Pearson, 128 U. S. 1.
[9] County of Mobile *v.* Kimball, 102 U. S. 691, 702; Gloucester Ferry Co. *v.* Pa., 114 U. S. 196, 203.
[10] Loewe *v.* Lawlor, *supra.*
[11] Cincinnati Packet Co. *v.* Bay, 200 U. S. 179.
[12] 193 U. S. 197, 361. See 17 HARV. L. REV. 474, 478.
[13] *Cf.* 17 HARV. L. REV. 480.